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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1948.

No. 352-353

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,

Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari and Brief in Support Thereof.

JACOB RASSNER,
220 Broadway,
New York City,

and

BERGNER & BERGNER,
11 Park Place,
New York City,
Of Counsel for Petitioners.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States.

Your petitioners, Kent Food Corp. and Clark-Iger Food Products Co., Inc. respectfully pray that a Writ of Certiorari issue to review:

A. The order of the Circuit Court of Appeals of the United States for the Second Circuit denying the petitioners' motion to dismiss the appeal from the order and decree of the District Court of the United States for the Eastern District of New York, on the ground that the said appeal was not timely taken.

B. The order and decree of the said Circuit Court of Appeals reversing the order and decree of the District

Court aforesaid and remanding the cause for elimination of the provisions of the decree which permit the release of the libelled goods for export and the substitution of provisions appropriate to condemnation.

And in support of their petition, your petitioners respectfully show to this Honorable Court:

Statement of the Matter Involved.

Libels for condemnation in accordance with the Federal Food, Drug and Cosmetic Act (21 U. S. C. 301 *et seq.*) were filed against a number of cases containing bottles of tomato catsup (Record, p. 3). The libels were issued out of the District Court of the United States for the Eastern District of New York.

One of the lots which was libelled belonged to and was the property of petitioner Kent Food Corp. At the time that the libel was filed, this merchandise was in the place of business of that petitioner, it was marked for export (Record, p. 12, fol. 36).

The facts are somewhat different in the case of the second libel which was filed against property belonging in part to the petitioner, Kent Food Corp. and the balance to petitioner, Clark-Iger Food Products Co. Inc. This libel affected some cases of tomato catsup located in the warehouse of the petitioner, Kent Food Corp. and some cases located in the warehouse of the Sweet Life Food Corp. At the time of the issuance of the libel, all of these cases were packed and strapped for export. In fact the United States government had purchased these specific cases from Sweet Life Food Corp. for export (Record, p. 13, fol. 38).

The contents of the bottles of catsup did not come up to the high standards in effect in the United States. They are and were, however, fit for human consumption as food

and the District Court so found (Record, p. 14, fol. 41; p. 22, fol. 65; p. 24, fol. 70; p. 44, fol. 133). At the point of origin of these goods, the State of Michigan permitted that they be sold for export purposes. The Food and Drug Administration was at all times aware of the proposed use and it offered no objection (Record, p. 13, fol. 39).

A laboratory report of a test of this tomato catsup was to the effect that the tomato catsup

> "* * * is satisfactory for human consumption and can be sold to those countries whose standard for mold count is not quite as high as the United States" (Record, pp. 21 and 22, fol. 65).

After the libels were filed, the claimant petitioners appeared and consented to a decree of condemnation under the Food and Drug Act and requested permission in accordance with 21 U. S. C. 334 (d) to sell the product for export purposes. The consent to a decree of condemnation was for the purpose of expediting matters, avoiding the delay incident to a trial of the issues presented by the libels and securing the immediate release of the goods for export (Record, p. 12).

A decree of condemnation was entered (Record, p. 26) and the District Court directed the release of the libelled goods upon the filing of a proper bond. The decree provided that the goods should be packed for export shipment under the supervision of the Food and Drug Administration of the Federal Security Agency and released to the claimant petitioners.

Following the entry of the decree of condemnation, the government applied for reargument of the original motion and to vacate that decree on the alleged ground that the goods had been offered for domestic sale and that the Court lacked power to release the goods.

The Court granted reargument and again made a finding that the libelled goods were in fact fit for human consumption.

Its specific finding was that the food

> "* * * is fit for human consumption, is in accordance with the specifications of foreign purchasers and is not in conflict with the laws of the country to which it is to be sent" (Record, p. 45, fol. 133).

On the basis of such finding, the District Court adhered to its original decision and permitted export. It determined that the Food and Drug Act conferred power upon it to release the goods. The goods are still held in this country pursuant to stipulation that they will not be exported or destroyed pending final determination of this matter.

The Circuit Court of Appeals erroneously interpreted the decision of the District Court on the reargument to mean that the District Court had found as a fact,

> "That the claimants did not intend to export the goods but planned to dispose of them in the domestic market" (Record, p. 60, fol. 64).

This interpretation clearly finds no support in the record as appears from an examination of the specific language of the District Court in the opinion following reargument. The District Court said that its decision would not have been different even if as a fact the claimants had not originally intended the goods for export. The specific language of the District Court was,

> "therefore assuming, and even finding as a fact, that the claimants did not intend to export the

goods, but planned to dispose of them in the domestic market, I still adhere to my original determination."

Manifestly, this is not a finding of fact but is merely *arguendo,* an explanation of the Court's understanding of the statute.

The first decree (Record, p. 26) permitting the export of the libelled articles was entered in the District Court on July 16, 1947. The time to appeal from that decree expired October 15, 1947 (28 U. S. C. 230). An appeal was not taken within that time.

A motion was made by the libellant for reargument. The court granted reargument and upon such reargument, the original decision was adhered to. The order on the motion for reargument (Record, p. 46) was entered on October 29, 1947. This was more than three months after the date of the entry of the original order. The notice of appeal was served on December 17, 1947. The appeal was taken from the original decree (Record, p. 26) and from the decree after reargument (Record, p. 46).

A motion was made in the Circuit Court of Appeals to dismiss the appeal on the ground that it was not timely taken. The learned Circuit Court denied the motion without opinion.

The learned Circuit Court, on reversing the decree of the District Court and remanding the libels for elimination of the provisions permitting export of the libelled articles stated its opinion to be that the Court lacked power under the statute to permit such export. In its opinion of reversal, the learned Court held that goods which would be exempt from seizure and condemnation by virtue of 21 U. S. C. 381 (d) relating to goods for export could never thereafter become entitled to such exemption if such goods had at any time been offered for sale in domestic commerce.

The Basis Upon Which This Court Has Jurisdiction.

Petitioners seek a review by Certiorari pursuant to 28 U. S. C. 347 (a).

The date of the entry of the judgment sought to be reviewed is June 16, 1948. A petition for rehearing was denied and the order denying such petition was entered in the Circuit Court of Appeals, Second Circuit on July 19, 1948.

Questions Presented.

The questions presented by the case and on which review is sought by petitioners are as follows:

1. Was the appeal from the Decree of the District Court timely taken pursuant to the provisions of 28 U. S. C. 230?

2. Does 21 U. S. C. 334 (d) empower the District Court to permit the release for export of condemned articles which meet the standards established by 21 U. S. C. 381 (d)?

Reasons Relied on for the Allowance of the Writ.

Your petitioners contend that the decision of the Circuit Court of Appeals for the Second Circuit improperly construes the Federal Food, Drug and Cosmetic Act.

21 U. S. C. 342 establishes a standard of adulteration for goods in domestic commerce. 21 U. S. C. 381 (d) establishes a different standard of adulteration for goods to be exported to foreign countries. 21 U. S. C. 334 (d) contains provisions for the condemnation of goods which are adulterated. It does not distinguish between domestic or foreign goods. That statute permits the release of goods which have been condemned on condition that they

be sold in compliance with the Act. Your petitioners believe that if the goods conform to the standard of the statute, whatever that standard may be, the District Court has the power to direct their release and sale, and that the previous history of the goods is of no moment.

Your petitioners believe that goods which conform to the standards established by the Statute for export, may be exported in compliance with the Act. Since admittedly, the articles in question conform to the standards for export, the export of those goods would not be in violation of the statute. Such goods do not become branded with the ineradicable mark of Cain when they are libelled and condemned by reason of their shipment in domestic commerce. While the shipper may be liable to punishment for commission of crime, the articles themselves can be sold for export.

The question of the power of the Court, under the Act to permit the release of condemned articles for export is of first impression. Counsel for the petitioners have been unable to find a single precedent in any Circuit Court or in this Court. No pertinent precedent was referred to in any of the briefs in the Court below, except for some unreported decisions of a District Court. For the foregoing reasons, counsel is of the belief that this question is of first impression.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals on the appeal from the judgment and decree of condemnation was not in accord with the purpose and intent of Congress in enacting the Federal Food, Drug and Cosmetic Act, in that it was not the intent of Congress to effect the destruction of goods which are fit for human consumption and which are not adulterated within the meaning of the term as it is defined in the Statute.

Your petitioners further believe that this matter is of the utmost importance to all who are engaged in the ex-

port of goods to foreign countries. In view of the fact that there is no reported decision either of a District Court, of a Circuit Court of Appeals or of this Court on this question, those who deal in the export of commodities are uncertain as to their rights, and the power of the Court to afford relief under the Food and Drug Act. This uncertainty should be dispelled by a ruling of this Court.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals on the appeal from the decree was erroneous and improper because that learned Court misinterpreted the ruling of the District Court and therefore made a decision which was not in accord with the facts. The District Court did not find that the goods were knowingly sold in Domestic Commerce and the Circuit Court's conclusion to the contrary constitutes a ruling based upon facts which do not exist.

Your petitioners further believe that the decision rendered by the United States Circuit Court of Appeals was premised upon an incorrect hypothesis. It appears from its decision, that the Circuit Court was motivated to a great extent by its belief that the Act contains no provisions which constitute a deterrent to its violation and that it was therefore necessary to order the destruction of the goods to insure compliance with the Act in the future. The learned Circuit Court of Appeals overlooked the provisions of the Act which subject a violator thereof to punishment for crime.

Lastly, your petitioners urge that the Act contains provision for insuring compliance therewith apart from its penal sections. The Act and the decree which was made in this case, are to the effect that the owner of the condemned goods must file a bond; and that the further handling of the goods is subject to supervision by a governmental agency (Federal Security Agency). There is

no possibility of the goods being diverted from the export trade. The claimant has been subjected to considerable expense in complying with the directions of the decree of the District Court.

Your petitioners contend that the denial by the Circuit Court of Appeals of the motion to dismiss the appeal was erroneous because the effect of such ruling was to indefinitely extend the time of the respondent to appeal from the judgment of the District Court of the United States and constituted a nullification of Title 28, U. S. C., Section 230.

Your petitioners therefore verily believe that the application presents a case cognizable under the rules of this Honorable Court and one fundamentally appropriate for review by this Honorable Court.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a transcript of the record upon which its said decision and judgment were made and that the said judgment of the Circuit Court of Appeals may be modified by this Honorable Court so as to provide that the order and decree reversing the order and decree of the District Court of the United States for the Eastern District of New York may be vacated and set aside and that the decree of the District Court of the United States for the Eastern District of New York may be affirmed and that your petitioners may be permitted in compliance with the said decree of the District Court of the United States for the Eastern District of New York to export the merchandise which was libelled and that your petitioners may have

such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your petitioners will ever pray, etc.

Dated: New York, October 14, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.

By JACOB RASSNER,
220 Broadway,
New York City.

and

BERGNER & BERGNER, ESQS.,
11 Park Place,
New York, 7, N. Y.,
Counsel for Petitioners.

The Decision of the Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 259 and 260—October Term, 1947.

(Argued April 14, 1948 Decided June 16, 1948.)

Docket Nos. 20970 and 20971.

UNITED STATES OF AMERICA,
Libelant-Appellant,

v.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Claimants-Appellees.

Before:—SWAN, CLARK and FRANK,
Circuit Judges.

Appeal from the District Court of the United States for the Eastern District of New York.

Libels by the United States of America against 215 cases, more or less, and 902 cases, more or less, each case containing 24 bottles of an article labeled in part: "Michigan Brand Grade A Tomato Catsup Contents 14 Oz. Avoir. * * *," for seizure and condemnation as adulterated food

in interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. A. §334, wherein Kent Food Corp. and Clark-Iger Food Products Co., Inc., as claimants and owners, filed a motion for an order approving a consent to a decree of condemnation permitting release of the articles to claimants for export purposes only. From a decree entered upon the claimants' motion, libelant appeals. Reversed and remanded.

JOHN T. GRISBY, Atty., Dept. of Justice (J. Vincent Keogh, U. S. Atty., and Morris K. Siegel, Asst. U. S. Atty., both of Brooklyn, N. Y., and James B. Goding, Atty., Federal Security Agency, on the brief), *for appellant.*

DAVID BERGNER, of New York City (Bergner & Bergner and Samuel H. Friedman, all of New York City, on the brief), *for appellees.*

CLARK, *Circuit Judge*:

This appeal presents the question whether food condemned as adulterated in interstate commerce under the prohibition of the Federal Food, Drug, and Cosmetic Act, §304, 21 U. S. C. A. §334, may be released to the owners for export to another country. The district court, in an endeavor to conserve food available for human consumption and relying upon a provision of the Act exempting food products intended for export, §801 (d), 21 U. S. C. A.

§381 (d), held in favor of the claimant owners. The United States has appealed, contending that such action is beyond the court's power.

Here two libels were filed on February 26, 1947, for the seizure and condemnation of two lots of tomato catsup shipped in interstate commerce in November, 1946. Kent Food Corp. claimed the 215 cases involved in the first libel. It also claimed 441 of the 902 cases attached in the second libel, while Clark-Iger Food Products Co., Inc., claimed the remaining 461 cases. Claimants without answering moved "for an order approving a consent" to a decree of condemnation entered on condition that an order be made directing the United States Marshal to release the catsup to the owners and permit them to sell it for export purposes only. The district court accepted the claimants' contention that the catsup was packed for export when it was seized, stating that the adulteration consisted of high mold count, but that the goods were still fit for human consumption. Accordingly it entered a decree containing first an order of condemnation of the articles to the United States of America and then successive orders providing for their release by the Marshal to the claimants upon the filing of a bond conditioned in appropriate detail for the packing of the articles for export and shipment out of the country, in compliance with the provisions of 21 U. S. C. A. §381 (d) and under the supervision of the Food and Drug Administration of the Federal Security Agency. Thereupon the United States moved for a reargument, pointing out, among other things, that the Kent Food Corp. had actually been selling the adulterated articles for domestic consumption. The court granted the reargument and it adhered to its original ruling, even though it now found "that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market." It held that it had power in its discretion to permit the ex-

port of the goods under proper restrictions and was not required to order them destroyed.

The appeal of the United States is based upon an asserted lack of power of the district court thus to dispose of condemned articles. In supporting its position, the Government also asserts that the court's holding has the effect of destroying the efficacy of the original order of condemnation, since it permits and encourages persons subject to the Act to gamble upon compliance, knowing that the penalty for violation will be only an order for sale in the export trade. The only power of the Government to condemn is statutory, and hence our problem is solely one of statutory construction.

Subdivision (a) of 21 U. S. C. A. §334 makes liable to condemnation any article of food "that is adulterated or misbranded when introduced into or while in interstate commerce." Subdivision (d) of the same section provides for the disposition of condemned food by "destruction or sale" as the court may direct, with the direction that it shall not be sold contrary to the provisions of the Act or the laws of the jurisdiction in which it is sold, and with the further proviso that, upon the claimants paying the costs and executing a bond conditioned that the article shall not be sold or disposed of contrary to the provisions of the Act or the laws of any state or territory in which sold, "the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or employee duly designated by the Administrator." 21 U. S. C. A. §342 (a) (3) states that a food shall be deemed to be adulterated "(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food."

In a separate chapter of the Act, dealing with imports and exports, it is provided that a food "intended for ex-

port shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export." 21 U. S. C. A. §381 (d). The section goes on to provide: "But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter."

Thus the language of this last section deals with a subject matter entirely apart from that of condemnation under §334. Here we have the statement of an *exemption* from the operation of the Act. Sec. 334 deals, however, with the consequences of a violation of the Act by introducing an adulterated article into interstate commerce; and subd. (d) sets forth sanctions and remedies for such violation. Thus the part of the section which deals with release to the owner expressly provides either for destruction of the article or for its being brought into compliance with the provisions of the Act. It is further made clear that the article is not to be sold contrary to the provisions either of the Act or the laws of the jurisdiction in which it is sold. There is no provision for a sanction by way of a delayed exemption for export purposes, such as might have been secured had the articles been originally intended for such purposes. The district court did not consider that these articles were being brought into compliance with the law; indeed, there was no basis for such a view. The court thought it had discretion to resort, even after the articles had been condemned, to the special exemption granted by the statute.

In this we think the court was in error. The power specifically given to the court to do only certain things upon condemnation of the articles excludes the possibility

of according them a status they might originally have had, had they never been introduced into interstate commerce for the purpose of domestic sale. The clear purpose of the statute appears to be to visit the statutory penalties or sanctions upon articles thus found to be in violation of its provisions. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57, 58; *United States* v. *Dotterweich,* 320 U. S. 277, 280. The practical aspects of the situation would seem to support this construction, for there is nowhere disclosed an intention that a violator of the Act may avoid the consequences of his wrong by then exporting the outlawed goods to some foreign country which will receive them. However laudatory may be the purpose to conserve the food supply (perhaps even of a condiment or relish such as catsup), an attempt to rewrite the Act along these lines seems likely to have the effect of nullifying its chief purposes. The several provisions for extensive remedies of not merely seizure and condemnation, §304, 21 U. S. C. A. §334, but criminal prosecution and injunction, §§301-303, 21 U. S. C. A. §§331-333, also suggest the impropriety of the result reached below. Such limited legislative history as is called to our attention is to the same effect.[1]

Consequently we think that the provisions of the decree appealed from which go beyond the judgment of condemnation and provide for the release under the stated conditions of the articles to the claimants for export abroad are beyond the power of the court. The libels must be re-

1 The United States directs attention to congressional committee reports which emphasized the essential similarity of 21 U. S. C. A. §381(d) with the export exemption provision of the former §2 of the Food and Drugs Act of 1906, 21 U. S. C. A. §2, and argues that this imported an approval of the consistent policy throughout the 32-year life of the Food and Drugs Act, upon the part of the Administration to resist any attempt to effect the export of condemned food in the adulterated condition which was the basis of its condemnation. It cites *United States* v. *Jackson,* 280 U. S. 183, 193, and other cases, to the effect that an administrative interpretation, supported by reenactment of the statute, is entitled to weight in construing the statute.

manded for the elimination of these provisions and for the substitution of provisions appropriate to the condemnation of the articles under 21 U. S. C. A. §334 (d).

Reversed and remanded.

STATUTES CITED.

21 U. S. Code (Federal Food, Drug & Cosmetic Act)

* * * * * *

Section 331: Prohibited Acts:

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

Subdivisions b to l, inclusive, are not pertinent to this case.

* * * * * *

Section 333: Penalties—Violation of Section 331

(a) Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000.00, or both such imprisonment and fine: but if the violation is committed after a conviction of such person under this Section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000.00, or both such imprisonment and fine.

Subdivisions b and c are not pertinent to this case.

* * * * * * *

Section 334; Seizure—Grounds and jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of Sections 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any District Court of the United States within the jurisdiction of which the article is found: (*remaining portion of this subdivision is not pertinent to this case.*)

Procedure: multiplicity of pending proceedings:

(b) *This subdivision is not set out because it is not pertinent to this case.*

(c) *This subdivision is not set out because it is not pertinent to this case.*

Disposition of goods after decree of condemnation:

(d) Any food, drug, device, or cosmetic condemned under this Section shall, after entry of the decree, be disposed of by destruction or sale as the Court may, in accordance with the provisions of this Section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold; *Provided,* That

after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Chapter or the laws of any State or Territory in which sold, the Court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Chapter under the supervision of an officer or employee duly designated by the administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under Sections 344 or 355, be introduced into interstate commerce, shall be disposed of by destruction.

Subdivisions e and f are omitted because not pertinent to this case.

• • • • • •

Section 342: Aduterated food

A food shall be deemed to be adulterated—
Poisonous, insanitary, etc., ingredients

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or

(2) If it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of Section 346; or

(3) If it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

(4) If it has been prepared, packed, or held under insanitary conditions whereby it may have became contaminated with filth, or whereby it may have been rendered injurios to health; or

(5) If it is in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or

(6) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

Subdivisions b, c and d are omitted because not pertinent to this case.

• • • • • •

Section 381: Imports and Exports—Imports; examination and refusal of admission

Subdivisions a, b and c are omitted because not pertinent to this case.

Exports:

(d) A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Chapter if it

(1) Accords to the specifications of the foreign purchaser,

(2) Is not in conflict with the laws of the country to which it is intended for export, and

(3) Is labelled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this sub-section shall not exempt it from any of the provisions of this chapter.

TITLE 28—U. S. CODE.

(JUDICIAL CODE AND JUDICIARY.)

Section 230—Time for making application for appeal or Writ of Error

No writ of error or appeal intended to bring any judgment or decree before a Circuit Court of Appeals for Review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

* * * * * *

Section 347: Certiorari to circuit court of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari

either before or after a judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

Subdivision b and c are omitted because not pertinent to this case.

Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

AGAINST

UNITED STATES OF AMERICA.

Brief in Support of Petition for Writ of Certiorari.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported in the official reports. The opinion as rendered is annexed hereto.

II.

Jurisdiction.

Petitioners seek a review by Certiorari pursuant to 28 U. S. C. A. 347 (a). The date of the order denying the motion to dismiss the appeal is March 1, 1948. The date of the judgment of reversal sought to be reviewed is June 16, 1948 (Record, p. 65). Petition for rehearing was denied by order filed July 19, 1948 (Record, pp. 75 and

76). The mandate of the Circuit Court of Appeals for the Second Circuit was filed in the District Court for the Eastern District of New York on July 21, 1948.

III.

Statement of Case.

A summary statement of the case has been given in the foregoing petition for Writ of Certiorari, and for brevity, the statement is not repeated here.

IV.

Specifications of Error.

(a) The appeal to the Circuit Court of Appeals was not timely taken and it was error to deny the motion to dismiss the appeal.

(b) The export of the condemned articles would be in compliance with the Federal Food, Drug and Cosmetic Act and the Circuit Court of Appeals erred in remanding the decrees for the elimination of the provisions permitting export.

(c) The Federal Food, Drug and Cosmetic Act confers power upon the District Court to release food libelled under the Act for export to a foreign country.

V.

Argument.

There is presented for determination in the instant case, the question whether the Circuit Court of Appeals has correctly interpreted the provisions of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 334 (d).

There is also presented for determination in the instant case, the question whether the denial by the Circuit Court of Appeals of the petitioners' motion to dismiss the appeal to that Court was a nullification of the provisions of 28 U. S. C. 230 relating to the time within which an appeal may be taken from a District Court to a Circuit Court.

THE APPEAL TO THE CIRCUIT COURT OF APPEALS WAS NOT TIMELY TAKEN.

The right to appeal exists only by virtue of a statute conferring such a right. To avail oneself of that privilege, the statute must be strictly complied with. This is a fundamental rule which does not require the support of precedent.

The rule generally prevailing is that the pendency of a motion to vacate or to modify a judgment or order, validly existing and operative, does not postpone, defer or affect the commencement or continuance of the time prescribed by statute or rule of Court for the taking of an appeal (4 *Corpus Juris Secundum* 908, Section 442). The finality of litigation is a prime requisite for the orderly and proper administration of justice. Unless such finality can be obtained, no sanctity will attach to the decrees and judgments of the Court and litigation can and will become endless.

Unless provision is made for the termination of litigation, litigants can never become clear in their rights.

That basically is the reason and the explanation for the rule of *Res Judicata*.

If the Court, after due deliberation has come to the conclusion that it had power to act, its decision should be reviewed by appeal and not by motion to vacate on the ground of lack of authority. A motion to vacate on that ground is a renewal of the original motion.

To hold otherwise would be to permit endless litigation.

For example, an application might be contested on the ground that the Court was without jurisdiction to grant it. On the denial of that application, a new application could be made, again urging, in the same manner, that the Court lacked power. This is an absurdity and could go on *ad infinitum*.

In this case, when the motion was made in the District Court to reargue the motion theretofore made, it was urged that the statute did not grant power to the Court to release the condemned merchandise for export purposes. The government argued, in order to sustain its right to move for reargument that the Court had no authority to permit export and that therefore the decision allowing export was void. This however was the very argument which was advanced in opposition to the original motion for leave to export the merchandise. Obviously, therefore, the motion to reargue was nothing more than a renewal of the first motion and on the same grounds. Under no circumstances could it be deemed to be a motion to vacate a void judgment as contended for by the government. That being the case, and since the Court had already decided the very point in issue that is, whether or not the Court had jurisdiction, the time to review must be measured from the decision on the first motion and is not extended by the second motion.

In the case at bar, the Court overruled the government's contention of lack of authority on the first motion. The government had already had its day in Court. If it disagreed with the ruling, it should have appealed. It chose instead to secure a re-hearing upon which it met with no greater success. By doing so, the government lost the right to appeal by passage of time. No play on words can convert the second motion from a renewal of the first

motion to an independent motion to vacate, as the government argued in opposition to the motion to dismiss the appeal. The government, like any ordinary litigant, is limited to only one attempt in the lower Court. This Court has declared the rule stated above to be the law in *Stevirmac* v. *Ditman*, 245 U. S. 210.

See also *Painter* v. *United Trust Co.*, 246 Fed. 240.

Since an appeal does not lie from an order entered on a motion for reargument or from an order denying a motion to vacate a previous order, it must be held that the government has therefore taken an appeal from the original order and it is subject to the time limitation which is applicable thereto (*Smith* v. *U. S.*, 52 Fed. 2nd 848). See also *Republic* v. *Richfield*, 74 Fed. (2d) 909. Since the appeal when taken, was filed more than three months from the date of the entry of the first order, the appeal was not timely and it should have been dismissed. The learned Circuit Court was in error in denying the petitioners' motion to dismiss such appeal.

The Federal Food, Drug & Cosmetic Act Conferred Power Upon the District Court to Permit the Release of the Libelled Articles for Export Purposes.

The Federal, Food, Drug & Cosmetic Act, Chapter 9 of Title 21 of the United States Code relates to commerce in food, drugs and cosmetics.

It is necessary to bear in mind that any proceedings which are taken under that section and which relate only to a commodity, as distinguished from an individual, are not criminal in nature but relate solely to the control of the sale and distribution in commerce of the various products regulated by that Act. The proceedings at bar are not criminal proceedings directed at an individual and in-

itiated for the punishment of that individual, but are proceedings for the regulation of the sale and distribution in commerce of a lot of tomato catsup.

It is the manifest purpose of the Federal Food, Drug and Cosmetic Act, insofar as the commodity itself is concerned, to establish and provide machinery for the maintenance of certain standards, to the end that the ultimate consumer will not be subject to injury from the use or consumption of improper articles and also to insure that the ultimate consumer will not be misled by false advertising when he purchases such a commodity.

21 U. S. C., 334, subdivision (a) contains provisions for the procedure with respect to libel and condemnation. It is significant that it does not contain a definition of the word "adulterated" although it provides for the libelling and condemnation of articles which are "adulterated".

We must therefore look elsewhere in the Act to ascertain what is meant by the term "adulterated". We find that that word has a flexible meaning. 21 U. S. C. 342 defines food which is "deemed to be adulterated". This definition sets a very stringent standard. We also find that 21 U. S. C. Section 381D provides that an article "shall not be deemed to be adulterated" if it conforms to a stated less stringent standard and is to be exported.

It follows therefore, that the intention of Congress manifestly was to provide different and differing standards of adulteration depending upon circumstances. It is obvious that Congress envisaged the possibility that an article might be deemed adulterated or unadulterated depending upon the destination to which that article is consigned. Congress must have intended and provided for the possibility that a sub-standard article might be subject to condemnation if shipped in interstate commerce and yet be capable of being sold for export if it conformed to the standards of the country to which it is consigned.

In the case at bar, the government contended that the libelled tomato catsup was adulterated because it did not conform to the standards of Section 334a and because it was shipped in interstate commerce. Upon these facts, if true, the goods were liable to proceedings pursuant to Section 334a.

The claimants, on the ground of expediency, elected not to contest the government's allegations and they consented to a decree of condemnation. The export of these same goods was permissible by virtue of 21 U. S. C., 381d. If so exported, they could be sold in compliance with the Act. The attention of the Court is respectfully directed to the fact that at no time has the government ever advanced the contention that these goods do not conform to the standards established by Section 381d. It therefore cannot be denied that the goods do conform to those standards. That being the case, if the goods be shipped for export, they cannot be deemed to be adulterated. If they are not to be deemed adulterated, they may be disposed of without violating the Act and their export is in compliance with the Act.

21 U. S. C., 334d provides, that where goods are libelled and condemned, the Court may direct that the goods so condemned be delivered to the owner to be brought into compliance with the provisions of the Act. It follows from the foregoing, that since in the export trade the goods in question are not to be deemed adulterated, that they can be sold in compliance with the Act.

There is unanimity of opinion in all of the Courts which have construed section 334d that it was the intention of Congress to provide for the regulation of commerce and not for the destruction of goods introduced into commerce. The Courts have consistently ruled that a decree of condemnation does not require the destruction of goods. Condemnation is not synonymous with, nor

does it necessarily entail confiscation (*U. S.* v. *43½ gross Prophylactics*, 65 Fed. Supp. 534 Aff'd, *Gelman* v. *United States*, 159 Fed. [2d] 881). The Courts have construed the Act to mean that when goods introduced into commerce are found for one reason or another to be in violation of the Act, these goods may be libelled, and if something can be done to these goods so that they will no longer offend against the Act, they may be released. That is exactly what was done in the case at bar. To insure that this will properly be done, provision is made for release under bond and subject to supervision by governmental agency.

See also *United States* v. *43½ gross Prophylactics, supra; United States* v. *935 cases Tomato Puree*, 65 Fed. Supp. 503; *A. O. Anderson* v. *United States*, 284 Fed. 542; *United States* v. *893 cans*, 45 Fed. Supp. 467.

The Circuit Court of Appeals, in reversing the decree of the District Court, in the case at bar, suggested that to permit the release of the goods might result in the avoidance by a violator of the consequences of his wrong. No such result need be feared because the statute contains its own penalties. It provides for criminal punishment of the violator. 21 U. S. C., 333. These penalties are very severe.

The learned Circuit Court referred to the case of *Hippolite Egg Co.* v. *the United States*, 220 U. S. 45, as a precedent for its determination that the Statute requires the destruction of the libelled goods. The assumption is unwarranted. The *Hippolite* case established nothing more than the "original package" doctrine. It was held in that case that where adulterated goods had reached their final destination but were still in the original package, these goods could be condemned even though they were, strictly speaking, no longer moving in interstate commerce. That case established the rule to be, that the

goods are to be deemed still to be in interstate commerce even when they have reached the premises of the consignee, if at the time when proceedings are brought, the goods are in the same original unbroken package in which they were shipped in interstate commerce. That case has no relation to the power of the Court to permit that the goods be used. That question was not considered.

In its opinion, the learned Circuit Court adopted a strained construction of the last sentence of 21 U. S. C. 381 (d). That sentence, referring to articles deemed not to be adulterated because intended for export reads as follows:

> "But if such article is sold or offered for sale in domestic commerce, this sub-section shall not exempt it from any of the provisions of this chapter."

The learned Circuit Court of Appeals ruled that Section 381d, by virtue of this qualifying provision, confers a transitory exemption upon goods intended for export. Such an interpretation destroys the very purpose of the Act. A fair construction of that sentence indicates that what was meant by Congress was, that if goods are marked for export, they are nevertheless subject to condemnation if they are in fact sold in Domestic Commerce. As soon as they are removed from Domestic Commerce and either diverted or restored to foreign commerce, they may be exported.

The learned Circuit Court further based its decision in part upon a state of facts which finds no support in the record. The learned Circuit Court referred to a declared administrative policy to refuse to approve the diversion for export, of condemned food in the very condition which was the basis of condemnation, even though such condition is not violative of 21 U. S. C. 381 (d). Nowheres in the

record is there any reference to this assumed administrative policy. It is true that in the brief submitted in the Circuit Court, reference was made by the government to some unreported decisions of a District Court. Such brief however cannot be considered to be part of the record because the Court of original jurisdiction had no opportunity to verify the citation or to determine its pertinence.

The learned Circuit Court further stated in the course of its opinion that the District Court had found as a fact that the goods must be deemed adulterated because they had in fact been offered in domestic commerce. This finds no support in the record. The District Court did not find as a fact that the goods had been offered for sale in domestic trade (see Record, p. 45, fol. 134 from which it clearly appears that the District Court made no finding of fact but merely stated that even if that fact were true, its decision would remain unaffected thereby). There was no warrant for the conclusion of the Circuit Court that the District Court had ruled that the claimants were violators of the Act. The fact remains and the record discloses that no part of the 902 cases of catsup were ever in domestic commerce.

It is conceded by the petitioners and the respondent that there is no reported decision, either of a District Court, of a Circuit Court, or of this honorable Court, with respect to the power of the District Court under the Food and Drug Act to permit the export of condemned goods in the condition which is the basis of their condemnation, in a case where such goods can validly be exported while in such condition. That being the case, persons who deal in the export of foods have no authoritative answer to the question concerning the Court's power. It does not seem to be proper that food which has great monetary value and which is possessed of great nutritional value should be destroyed because wittingly or unwittingly, these goods

were shipped in interstate commerce. An anomaly is presented by a rule which declares that if goods are prepared for export, they may be exported, but if the same goods are wittingly or unwittingly introduced in interstate commerce, they must be destroyed.

There is no justification for having a different rule with respect to goods for export than that which prevails with respect to goods for domestic consumption. It is conceded that with respect to goods for domestic consumption, these goods may be sold in spite of condemnation if the conditions justifying condemnation be cured or removed. There is no valid reason for applying a different rule with respect to goods intended for export, especially since the statute makes no such exception.

This matter is of great importance to the claimants and to the export trade in general because large amounts of money are involved. This Honorable Court can very well understand that there are times, when unknown to the owner, goods which do not conform to the high standards prevailing for domestic consumption but which do meet the standards for export may, through such lack of knowledge or information, be shipped in interstate commerce. It would be violative of the spirit of the Act to deny to the owner of those goods the opportunity to export these goods.

It is respectfully submitted therefore, that since the purpose of the Federal Food, Drug & Cosmetic Act was to control commerce in certain products, that it is not the purpose of the Act to affect the destruction of goods which meet the standards established by the Food and Drug Act. If goods can be treated in such a manner that they do conform to the standards established by the Act, their release may be directed by the Court for sale in the United States. If the goods are in the condition where they either

can conform or be made to conform to the standards of a foreign country, they may be exported provided they are labelled so as to indicate that they are intended only for export purposes. In the case at bar, since the libelled tomato catsup conformed to the standards of many foreign countries, they can be brought into compliance by labelling which will indicate that they are intended for export and the Court can release them for such export under conditions which will insure that there will be no diversion from such export trade.

The foregoing is respectfuily submitted.

JACOB RASSNER,
220 Broadway,
New York City.

BERGNER & BERGNER,
11 Park Place,
New York City,
Counsel for Petitioners.

JACOB RASSNER,
DAVID BERGNER,
SAMUEL H. FRIEDMAN,
Of Counsel.

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Cat. Nos. 352, 353.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

KENT FOOD CORP. and CLARK-IGER FOOD PRODUCTS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

Petitioners submit for the consideration of this learned Court their reply to the brief of the Government, and further in support of the petition for a Writ of Certiorari directed to the Circuit Court of Appeals, for the Second Circuit, in the above entitled matter.

Counsel will not burden the Court with a repetition of what has already been fully treated in the main brief, and will limit themselves to a discussion only of such new matter as is presented by the brief in opposition to the petition.

For the sake of clarity, all references will be to the United States Code, Title 21.

The Facts.

The brief in opposition reveals a misapprehension by the respondent, with respect to the facts. For example,

it would appear from a reading of the last paragraph on page 6, and its continuation on page 7, of the brief in opposition, that the District Court made a finding of fact. An analysis of the record negates this conclusion beyond the possibility of refutation. The Government's observations are apparently based upon folios 132 to 134 inclusive (pp. 44 and 45) of the Record.

The Government has interpreted folio 132 to indicate that the Court concluded that the goods in question were never intended for export. That this conclusion is unjustified is obvious from a reading of that portion of the Record. It clearly appears that Mr. Judge Kennedy was not stating a conclusion of his own, but was merely summarizing the contentions raised by the affidavits submitted in support of the motion. It is unfortunate that Judge Kennedy chose to express himself in the ambiguous language which he employed. In spite of that ambiguity, however, there is no justification for the statement that the Record includes a finding of fact in agreement with the Government's contentions; and such statement is inaccurate. It should be remembered that these contentions of the Government were traversed by the petitioners in this Court (see affidavit of Samuel Swoff, Record, pp. 39 to 43).

A consideration of folio 134 (Record, p. 45) shows clearly that Judge Kennedy did not deem it of importance, in the decision of the case, to pass upon the disputed question of fact. He said:

> "Assuming, and even finding as a fact, that the claimants did not intend to export the goods, but planned to dispose of them in the domestic market, I still adhere to my original determination."

The Record unquestionably indicates that Judge Kennedy did not deem it of importance to the decision of the matter to make a specific finding of fact for the reason that such

a finding of fact was not necessary for the determination of the question presented to him, *i. e.*, the question of the Court's power to permit that condemned goods be exported in compliance with Section 381.

The Government makes the further contention that the failure to consign the goods to a particular foreign purchaser indicates that the goods were not intended for export. Such an assumption is not justified by the facts and indicates a total disregard of the customary practice prevailing in the export trade.

It is customary to ship goods intended for export to a trade center where dealers and brokers congregate and meet. At that point, *i. e.*, the trade center, the goods are consigned to their final destination, to the purchaser procured by a broker. It is not uncommon when goods leave the owner's possession, that the owner does not know to whom they will ultimately be sold for export. To act otherwise would make it impossible for goods to be sold for export. This impossibility would be based upon the fact that the prospective customer could not go to a central place to examine the goods, and a centrally located market could not exist. The exigencies of the export business demand that goods for export be shipped to a specific market for sale and trans-shipment to a foreign customer. It is obvious, therefore, that the failure of the owner of merchandise to consign them to a particular foreign purchaser does not, as contended by the Government, indicate an unlawful intention to divert such goods to the domestic market. It should also be noted that the Government released these goods from their original source—the manufacturer.

The Law.

The Court's attention is, at this time, respectfully directed to the omission from the brief in opposition of any

reference to pertinent authority on the question of the power of the Court to permit export of merchandise which has been condemned, where such export is not prohibited by the statute. The Government concedes by such omission, that this question is of first impression.

The argument that the statute permits, under certain circumstances, that condemned goods may be released for sale in this country, but that under no circumstances can condemned goods be released for export, cannot be characterized otherwise than as circumlocution.

Section 334 permits that goods may be released to be brought into compliance with the provisions of the Chapter. Goods may be brought into compliance with the provisions of the Chapter when they may validly be sold as unadulterated. Section 342 defines adulterated goods with respect to domestic commerce. Section 381 defines adulterated goods with respect to foreign commerce. If, in either case, the goods conform to the applicable definition, they are sold in compliance with the Act. To hold otherwise is a strained construction.

The Government argues further, on page 11 of its brief, that great significance must be given to the fact that the statutes under consideration are contained in different titles. An examination of this argument discloses its vicarious and unsubstantial nature. The Government argues that because the provision with respect to export and the provision with respect to condemnation are contained in separate titles or sub-titles, it follows that export of condemned goods is not permitted. This argument is entirely baseless.

Section 381, relating to exports, is contained in subchapter 8 of the Act. That sub-chapter is complete without reference to any other portion of the Act. That subchapter relates to exports and imports, and no other subject.

Section 342 is contained in sub-chapter 4 of the Act. That relates solely and entirely to food generally, and is complete within itself and has no relation to any other sub-chapter.

Section 334, which relates to prohibited acts and penalties is contained in sub-chapter 3, and is complete in itself. We see, therefore, from the fact that there are separate sub-chapters devoted to each topic, that it was the manifest intent of Congress to provide certain standards with respect to foreign goods (sub-chapter 8), and different standards with respect to domestic goods (sub-chapter 4). Since sub-chapter 3, containing the regulatory provisions, does not differentiate between domestic and foreign goods, it is manifest that it was the intention of Congress that these provisions should have general application only.

Adopting that construction, the statute becomes a wise and logical enactment. In the light of that construction then, it must be held that Congress intended that a Judge of the District Court should have the power to permit the sale of goods if, in the event of such sale, the goods conformed to some statutory definition of "unadulterated". If the goods could be treated in such a manner that they conformed to the high standard for domestic goods, they could be released for domestic sale. If the goods, in spite of treatment, could not be made to conform to the standard for domestic goods, but did meet or could be made to conform to the standard for foreign goods, they would, therefore, be sold if released, in compliance with the Act, and the Court had power to direct such release.

The contention urged by the Government on page 13 of its brief to the effect that there is danger of fraudulent diversion of merchandise if the Court be granted such power, falls of its own weight. There is no greater possibility of diversion with respect to foreign goods than there is with respect to goods for domestic trade. Con-

gress recognized and provided against the possibility of diversion by the requirement that proper bond should be filed and that the disposition of the goods should be under the supervision of the Federal Security Agency. Does the Government seriously urge that in spite of the vigilance of the Federal Security Agency, there is no safeguard against diversion? To pose the question is to furnish the answer.

It is therefore respectfully submitted that Congress has vested the District Court with power to permit the sale of condemned goods in the export trade, and that that power was properly exercised by the District Court. It is respectfully submitted that the Circuit Court was in error when it refused to recognize the existence of such power in the District Court.

One point remains for consideration and that is the matter of the timeliness of the appeal. Counsel will not burden the Court with an extended discussion of this matter for the reason that this was fully considered in the main brief.

The cases cited in the government's brief with respect to the rule of law applicable to the timeliness of the appeal are clearly distinguishable from the case at bar. All of the cases cited in the government's brief were cases in which the second application had been made pursuant to some rule of Court. For example, they were either made in bankruptcy proceedings in which a special rule applies or pursuant to some rule of Court permitting an application for re-hearing. The government has referred to Rule 59b of the Federal Rules of Procedure in support of its contention that the second application extended the time to appeal. If this second application in the case at bar had been an application for a new trial, the government would be correct in its contention but the second application made in this case was not an application for a new

trial and is therefore not governed by the provisions of Rule 59b.

The question is not of first impression. In the case of *Zadig* v. *Aetna*, 42 Federal, Second Series, 142, the Court pointed out the difference between a second application made pursuant either to a statute or a rule and a second application made for a re-hearing on a previous application, where there is no rule or statute permitting such second application. The Court ruled in that case that where the statute or rule provides that a second application may be made, the time to appeal is measured from the order on the second application and where there is no such authority for a second application, the making of the second application does not extend the time to appeal.

It is therefore respectfully submitted that the cases cited on page 8 of the government's brief had no relevancy to the case at bar and that the appeal in this case taken from the District Court to the Circuit Court of Appeals was not timely taken. The Circuit Court of Appeals was in error when it declined to dismiss the appeal.

A Writ of Certiorari should issue to the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

JACOB RASSNER,
220 Broadway,
New York City.

BERGNER & BERGNER,
11 Park Place,
New York City,
Counsel for Petitioners.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 352, 353

KENT FOOD CORP. AND CLARK-IGER FOOD PRODUCTS CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 59-63) is reported at 168 F. 2d 632. The opinions of the District Court (R. 23-25, 44-45) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 16, 1948 (R. 63-65), and a petition for rehearing was denied July 19, 1948 (R. 75-76). The petition for a writ of certiorari was filed October 15, 1948. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the respondent's appeal from the decree of the District Court timely?

2. Did the District Court, after the entry of a decree condemning adulterated articles of food, have the power to release those articles for export in the same adulterated condition which constituted the basis for the condemnation?

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides:

> Sec. 304(a) [21 U.S.C. 334(a)].
>
> Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found * * *.
>
> Sec. 304(d) [21 U.S.C. 334(d)].
>
> Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be

sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such articles shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. * * *

Sec. 402 [21 U.S.C. 342(a)(3)]. A food shall be deemed to be adulterated—

* * * * * *

(a)(3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food. * * *

Sec. 801(d) [21 U.S.C. 381(d)].

A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for

export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act.

STATEMENT

On February 26, 1947, two libels of information were filed by the United States in the District Court for the Eastern District of New York, pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act, for the seizure and condemnation of two separate lots of tomato catsup, consisting of 902 and 215 cases, respectively, which had been shipped in interstate commerce from Bay City, Michigan, to Brooklyn, New York, and Maspeth, Long Island. Each of the libels alleged that the food was adulterated in interstate commerce within the meaning of Section 402(a)(3) of the Act in that it consisted wholly or in part of decomposed tomato material. (R. 3-5; see also R. 1-2, 10, 29.)

Kent Food Corp. and Clark-Iger Food Products Co., Inc., petitioners here, appeared in the proceedings as claimants (R. 6-7, 8-9), and the libels were consolidated (R. 29). No answers to the libels were filed. Instead, petitioners filed a motion "for an order approving a consent to a decree of condemnation" which would permit release of the articles to petitioners for export (R. 10-11). Attached to this motion was an affidavit of an officer of Kent Food Corp. (R. 12-18) in which it was

alleged that the catsup was originally intended for export; that the manufacturer, Beutel Canning Company of Bay City, Michigan, had secured permission from the state health department to ship the catsup out of Michigan for export; that Andre Trading Company, from whom petitioners purchased the catsup, had not informed them that it was to be sold only for export; and that the lot of 902 cases which was seized in the warehouse of Sweet Life Food Corp. had been sold to Sweet Life by petitioners, and that Sweet Life had in turn sold it for export (R. 12-15).[1]

The court entered a memorandum opinion (R. 23-25) on July 3, 1947, granting the motion and permitting (R. 24-25):

> * * * the entry of a decree of condemnation which will provide for release of the goods to the owner, under such terms and conditions as may be suggested by the Government, so that the goods may be exported in compliance with the provisions of Sec. 381(d). I believe the section last mentioned applies, because I find as a fact on the papers before me that the good were intended for export while in the hands of the claimants although the seizure was justified because there was no literal compliance with the statute * * *.

---

[1] The lot of 215 cases involved in the other libel was seized in the warehouse of Kent Food Corp. and it is the sole claimant of this lot (R. 12-13).

On July 16, 1947, a decree of condemnation was entered (R. 26-29), which provided for the release of the catsup to petitioners for the purpose of preparing it for export "in compliance with the provisions of 21 U.S.C.A., Section 381(d)."

On September 10, 1947, the Government moved for reargument and for an order vacating the court's order of July 16, 1947, permitting release of the goods for export (R. 30). Attached to this motion were affidavits of two employees of the Food and Drug Administration (R. 32-36, 37-38) which showed that the catsup had been "produced in whole or material part from rotten tomatoes" (R. 37-38); that Kent Food Corp. had ordered 4000 cases of this brand of catsup from Andre Trading Company in September 1946 on the express understanding that it was to be sold for export only; that Kent had sold 285 cases of the catsup to its customers in the New York Metropolitan area, and another 2500 cases to a dealer in Scranton, Pennsylvania, which had been seized and was the subject of other litigation; and that in respect of the lot sold to Sweet Life, it was "mere coincidence" that the latter had sold it for export, since that corporation had stated to the affiant that it did not receive any specification that the catsup was to be sold for export only (R. 33-35).

On October 22, 1947, the court entered a memorandum opinion (R. 44-45) finding that petitioners did not intend to export the goods but planned to

dispose of them in the domestic market, but holding nevertheless that the court had discretionary power to permit the food to be exported, even though it could not be brought into compliance with law, so long as it is fit for human consumption and accords with specifications of foreign purchasers and is not in conflict with the laws of the country to which it is to be sent. Accordingly, on October 29, 1947, an order was entered granting the Government's motion for reargument, but adhering to the terms of the decree of condemnation entered on July 16, 1947 (R. 46-48).

A notice of appeal from the orders of July 16 and October 29, 1947, was filed by the Government on December 17, 1947 (R. 49). A motion by petitioners to dismiss the appeal on the ground that it was untimely (R. 54-58) was denied by the Court of Appeals on March 1, 1948 (R. 58). Thereafter, the Court of Appeals reversed the judgment of the district court in so far as it released the articles to petitioners for export, holding that such provisions of the decree were beyond the power of the court. It remanded the proceeding "for the elimination of these provisions and for the substitution of provisions appropriate to the condemnation of the articles under 21 U.S.C.A. §334 (d)." (R. 63.)

ARGUMENT

1. Petitioners' contention (Pet. 25-27) that the Government's appeal was not timely is without merit. As pointed out in the Statement, *supra*,

p. 6, the Government's motion of September 10, 1947, asked for reargument of the portion of the order of July 16, 1947, which released the catsup to petitioners for export sale, and the motion was supported by an affidavit showing that petitioners did not intend to export the goods but were selling them domestically. This evidence established that the court was mistaken in its understanding, as expressed in its opinion of July 3, 1947 (R. 23-25), that the catsup was intended for export. Although the Government's motion was not filed within 10 days after the entry of the order of July 16,[2] it was entertained by the district court, the court re-examined the original order in the light of the motion, concluded that petitioners did not intend to export the goods but planned to dispose of them domestically, but determined that nevertheless the court had power under the statute to release the goods for export. In these circumstances, the time for appeal ran from the date of the order on the motion. See *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; *Bowman* v. *Loperena*, 311 U. S. 262; *Wayne U. Gas Co.* v. *Owens Co.*, 300 U. S. 131; *Babler* v. *United States*, 137 F. 2d 98 (C.C.A. 8); *United States* v. *Schlotfeldt*, 136 F. 2d 935 (C.C.A. 7); cf. *Safeway Stores* v. *Coe*, 136 F. 2d 771 (App. D.C.), involving an untimely motion

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[2] See Rule 59 (b), Rules of Civil Procedure, prior to the amendments which became effective in March, 1948.

for rehearing based upon a later appellate decision.

2. It is undisputed that the tomato catsup was adulterated, as that term is defined in Section 402(a) (3), in that it consisted wholly or in part of decomposed tomatoes. The shipment of such adulterated food in interstate commerce (except in compliance with the conditions of the export exemption of Section 801(d)) subjects it to seizure and condemnation under Section 304. Where a district court has, as here, decreed the condemnation of adulterated food, the disposition of the food is governed by Section 304(d). The latter subsection provides three alternative dispositions: (1) destruction, (2) sale in compliance with the Act and the laws of the jurisdiction, or (3) delivery to the owner for destruction or to be "brought into compliance with the provisions of this Act" under the supervision of the Food and Drug Administration. Admittedly, the adulterated catsup could not be sold in compliance with the Act, and, admittedly, the composition of the catsup with the resulting high mold count could not be changed or improved, i.e., "brought into compliance," so that it would no longer be adulterated within the meaning of the Act. Thus, the district court was required to order the destruction of the catsup unless, as the petitioners contended and the district court held, the Act authorized the court to release it to them for export.

The district court held that Section 801(d) of the Act empowered it to release the catsup to the petitioners for export. That subsection provides:

> A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act.

The quoted language obviously provides an exemption, upon compliance with the stated conditions, from the consequences of transporting adulterated food in commerce. Where food is found to be adulterated within the definition of Section 402(a), the burden is upon the claimant asserting this exemption to show (1) that the food was intended for export, and (2) that there has been compliance with the enumerated conditions of Section 801(d).

In the district court's original opinion, it was found that the catsup was intended for export (R. 25). There was no finding, nor did the present petitioners even allege, that the catsup accorded to the requirements of any particular foreign purchaser or that it was not in conflict with the laws

of the country to which export was intended. In the district court's modified opinion after reargument, and upon undisputed evidence of domestic sales of such catsup by petitioner Kent Food Corporation, it was specifically found that the claimants "did not intend to export the goods, but planned to dispose of them in the domestic market." (R. 45.)

The petitioners contend, although the district court did not specifically adopt this reasoning, that the power given to a district court by Section 304(d) to release condemned food to the owner to be "brought into compliance with the provisions of this Act", embraces the power to release adulterated food for an export sale in which the food would no longer be regarded as adulterated for the purposes of the Act (Pet. p. 29). In fact, the petitioners even contend that when the export exemption of Section 801(d) is destroyed by domestic sales, it may be restored by re-diverting the goods to the export market (Pet. p. 31).

We believe that the Court of Appeals was clearly correct in reversing the District Court and in holding that Section 801(d) does not provide district courts with an additional alternative disposition of adulterated food condemned under Section 304.

The position of Section 801(d) in the Act as part of a different title than Section 304, as well as the fact that the export provisions of Section

801(d) derive from a similar provision in the Food and Drug Act of 1906,[3] indicate that the export provisions were not intended to constitute an alternative method of disposing of condemned food. The purpose of the export provisions is to allow American producers to export to foreign countries foods, drugs and cosmetics which, while adulterated by American standards, are acceptable to the countries to which they are exported. The American producer of such substandard food may not, under Section 801(d), ship such food in interstate commerce in the vague hope of finding a foreign purchaser, and with the risk that such food may be diverted to domestic consumption. Rather, the movement in commerce of such food subjects it to condemnation unless, in compliance with the express requirements of Section 801(d), the shipping packages are labelled to show intention to export, and the food is from the outset consigned to a specific foreign purchaser whose specifications are satisfied in compliance with the laws of his country.

Admittedly, when this proceeding was commenced, no foreign purchaser had been found for the catsup here involved (R. 41). Obvious practical considerations indicate that this export exemption is not an *ad hoc* matter—to be seized upon by a detected purveyor of adulterated food. Rather, Section 801(d) provides a narrow channel

[3] Section 2 of the Act of June 30, 1906; 34 Stat. 768.

—beginning with the initial movement in commerce —by which foods which are below our standards may be utilized solely for export to foreign countries willing to receive them. On its face, therefore, this export provision was not designed to provide a seller of adulterated goods in the domestic market with a last minute "out" from the consequences of condemnation—in this case destruction, since the catsup could not be made to meet the statutory requirements for sale in the United States.

The District Court's construction of Section 801(d) in relation to Section 304 holds out an attractive vista to the owner of adulterated food; with impunity he may ship in interstate commerce in search of a market, any market—and if the adulterated shipment is detected, he simply cries, "For export", thus minimizing the statutory liabilities for making such shipments. The distinction between legitimate export shipments which are at all times earmarked as such, and the maneuvering of a detected purveyor of adulterated food, becomes hopelessly blurred if the latter may at any stage invoke the discretion of a district court to allow such food to be diverted to export.

In any event, the last sentence of Section 801(d) provides that "if such article [a food, drug or cosmetic intended for export] is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act."

In other words, since the undisputed evidence and the finding of the District Court is that part of this batch of catsup had already been sold domestically (R. 34-35, 40, 44-45), the export provisions of Section 801(d) are by their terms inapplicable, and the disposition of the adulterated catsup is governed entirely by Section 304(d). Also, it should be noted, even if the original shipment of the catsup was exempt from condemnation by reason of compliance with the export provisions, that exemption was destroyed by the domestic sales.

The petitioners' contention that the power of the district court under Section 304(d) to deliver condemned food to the owner to be "brought into compliance" with the Act includes the power to allow such food to be exported, boils down to the argument that the subsection permits release of the food to be "sold in compliance with the Act" (Pet. pp. 6-7). The short answer to this is that Section 304(d) does not so provide. "Brought into compliance" means such reconditioning, reprocessing, or relabelling of the product as will remove the grounds upon which it was condemned as adulterated. In the same subsection, it is to be noted, when Congress desired to refer to sales it did so specifically, from which it can only be concluded that the phrase "brought into compliance" means exactly that, and does not include disposition by sale.

If there were any remaining doubt as to the issue, it would be resolved by the cardinal principle

of so construing the Food, Drug, and Cosmetic Act as to give effect to the Congressional purpose of assuring this country a pure supply of the commodities covered by the Act. This basic purpose can be fulfilled only by giving the export provisions of Section 801(d) a literal and natural construction which will not make that subsection a last-minute haven for every claimant of admittedly adulterated foodstuffs.

CONCLUSION

The decision below is correct. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
Attorney.

EDWARD E. TURKEL,
Attorney, Federal Security Agency.

NOVEMBER 1948.

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CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Number ——.

R. W. CLAXTON, INCORPORATED, PETITIONER

vs.

BOYD F. SCHAFF, ET AL, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, R. W. Claxton, Incorporated, being aggrieved by the decision of the United States Court of Appeals for the District of Columbia, handed down on the 28th of May, 1948, in the certain case or matter entitled before it as "R. W. Claxton, Inc., appellant, v. Boyd F. Schaff et al, appellees, No. 9609," now reported in 169 F (2d) 303, respectfully represents and shows unto the Court that:

I.

Statement of Matters Involved.

Petitioner is engaged in the business of selling seafood in the District of Columbia, and operates certain trucks in making deliveries to its customers. On the 7th of May, 1941, petitioner made a delivery of 7½ pounds of halibut fish to the Fat Boy Restaurant on New York Avenue near Bladensburg Road, N. E., in the District of Columbia. The restaurant sets back from the street, and has a private driveway around the building with parking space in the rear. About 7:40 A. M. on said date petitioner's driver drove its truck onto said private property and parked near the rear door of said restaurant, for the purpose of making said delivery. The driver expected to be in the restaurant only a few minutes, and left the ignition key in the switch while he went inside the restaurant to make the delivery. At that hour of the day, the restaurant was closed, and there were no persons loitering about the vicinity.

While the driver was inside, two employees of the restaurant, who had been at work in the kitchen when the driver entered the restaurant, went outside and got in the truck and drove it away.

Respondents were riding in the automobile of respondent Schaff, proceeding on West Virginia Avenue (some distance away from the restaurant), when their automobile was struck by petitioner's truck. The thief who was driving the truck was operating it at a fast rate of speed, and, in attempting to pass another automobile, either pulled over too far on the wrong side of the road, or temporarily lost control of the truck, and struck the automobile in which respondents were riding. The automobile was substantially damaged, and each of the respondents sustained some personal injuries.

Initial Proceedings in District Court

On the 6th day of June, 1942, respondents brought this action against petitioner in the United States District Court for the District of Columbia, alleging that it should respond in damages for their injuries, because, as they said, petitioner's truck at the said time and place "Was driven on said Avenue by a driver as agent of, and with the consent of, defendant," and that the collision was caused by the negligence of the petitioner's said agent (R-3). Petitioner answered, denying that its truck was operated by its agent or by any person with its knowledge or consent (R-4).

Upon the issue thus made (R-5), the case duly came on for trial. The evidence disclosed that the truck had been taken by one Matthews without the authority or permission of the petitioner; and the Court directed the jury to return a verdict in favor of petitioner, upon which judgment for petitioner was entered.

The respondents took an appeal to the United States Court of Appeals for the District of Columbia.

Decision of U. S. Court of Appeals on First Appeal

While the appeal was pending the said Court of Appeals handed down its decision in the case of *Ross* v. *Hartman* (78 U. S. App. D. C. 217, 139 F. (2d) 14), wherein the Court held that the violation of a traffic ordinance against leaving a vehicle unattended *in a public place* with the ignition unlocked and the key in the switch was negligence, and that such negligence might be deemed the proximate cause of the injuries sustained when the unknown person who drove the vehicle away negligently struck the appellant, overruling the prior decision of the Court in the case of *Squires* v. *Brooks* (44 App. D. C. 320).

When respondents wrote their brief as appellants in said appeal, they added an "additional" point, asserting that they had been prevented by the rule established in *Squires* v. *Brooks* from urging that petitioner was liable to respond in damages because its driver left the key in the ignition

switch, and also contending that the said vehicle had been left parked in a "public place."

The said Court of Appeals, with then Chief Justice Groner dissenting, reversed the judgment of the District Court, and remanded the case for a new trial (79 U. S. App. D. C. 207; 144 F. (2d) 532).

The full text of the Court's opinion is as follows:

> "This is an appeal by the plaintiffs from a judgment for the defendant, upon a directed verdict, in a suit for personal injuries.
>
> "The complaint alleged that appellants were injured by the negligent operation of appellee's truck by his agent. The only negligence alleged in the complaint was in the actual driving of the truck at the time of the accident. But the evidence showed that appellee's driver left the truck, with the keys in it, in the parking space beside a restaurant to which he was delivering goods for appellee, and that employees of the restaurant drove off in the truck and injured appellants.
>
> "*Squires* v. *Brooks*[1] held that the intervening act of a third person who helps himself to a car protects the driver who left the keys in the car from responsibility for a resulting accident. But the recent case of *Ross* v. *Hartman*[2] overruled the *Squires* case. It is true that the *Ross* case involved the violation of an ordinance against leaving an unlocked car in a "*public place*,"[3] and we do not think that a restaurant's private parking space is a "public space" within the meaning of the ordinance. But we said in the *Ross* case: "In the absence of an ordinance * * * leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and legal or 'proximate' cause of a resulting accident."[4] Under that ruling, the evidence in the present case should have been submitted to the jury with instructions to find for the plaintiffs if they found that

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[1] 44 App. D. C. 320.

[2] 78 U. S. App. D. C. 217, 139 F. 2d 14.

[3] Traffic and Motor Vehicle Regulations for the District of Columbia, § 58.

[4] 78 U. S. App. D. C. 217, 139 F. 2d 14, 15. Cf. *Maloney* v. *Kaplan*, 233 N. Y. 426, 135 N. E. 838.

the defendant's driver was negligent in leaving the car unlocked and that this negligence was a proximate cause of the accident.[5]

"Appellee contends that the issues on appeal should be confined to those which were duly presented at the trial. This of course is commonly true. But this suit was tried before the *Ross* case had overruled the *Squires* case. Therefore appellant did not have a fair chance to raise and press at the trial, nor the court to pass upon, the point concerning the keys. "We have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."[6] "On the appeal • • • the case should be disposed of under the law as determined by the later decisions."[7] The case will therefore be remanded for a new trial.

Remanded for a new trial.

"GRONER, C. J., *dissenting*: Plaintiffs brought this action, based on the presumption of agency arising from defendant's ownership of the vehicle and the negligence of the driver. The case was tried on that issue and resulted in a judgment of acquittal of the defendant.

"Since, as I understand, we all agree that on the issue made the case was properly decided, I think we should affirm rather than send the case back for a new trial on a totally different issue."

SUBSEQUENT PROCEEDINGS IN DISTRICT COURT

Upon the mandate of the said Court of Appeals, the District Court on the 18th of June, 1945, entered an order vacating and setting aside the judgment for petitioner, and restoring the case to the docket and trial calendar for

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[5] It was evidently not a proximate cause if, as some of the testimony tended to show, defendant's driver invited the restaurant employees to take the car.

[6] *Patterson* v. *Alabama*, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082.

[7] *Ruppert* v. *Ruppert*, 77 U. S. App. D. C. 65, 68, 134 F. 2d 497.

further proceedings (R-6). On the 29th of October, 1946 respondents filed a motion for leave to amend their complaint (R-7), proposing to amend paragraph 5 of their complaint by substituting a new paragraph 5, alleging that petitioners' agent "negligently and carelessly left said truck unattended and with the ignition key remaining in the lock, while said servant went inside said restaurant for delivery of fish," that two other persons then entered said unattended truck and finding the key in the ignition lock, drove it on the highway until the collision occurred, and that said collision was proximately caused by the negligent action of petitioners' agent in leaving said truck unattended without removing the key from the ignition lock. The court granted respondents leave to so amend their complaint (R-9). Petitioner thereupon filed an answer to the amended complaint (R-9).

Thereupon the case came on for pretrial hearing on the 17th of February, 1947 and by agreement of counsel it was stipulated that "the only issues to be tried in view of the decision of the Court of Appeals is that of negligence of the defendant in leaving the truck unattended with the ignition key therein and the negligent operation of the truck by the person operating it and whether or not acts of negligence of the defendant was the proximate cause of the injuries sustained by plaintiffs" (R-10, 11).

The case duly came on for trial upon the issues so presented. For the first time, the parties addressed themselves to the development of the evidence respecting the "circumstances" under which the truck was left unattended with the key in the ignition switch for a few minutes while the driver went inside the restaurant to make the delivery, and under which the said truck was stolen or taken without permission and driven away.

The respondents called *Luther Matthews,* who testified that he was employed at the Fat Boy Restaurant on the 7th of May, 1941, as a helper and handyman (R-21); that he had just finished cutting up some chicken when the truck came with a delivery of fish, and he and Hills and

another boy went for a ride for the first time with Roscoe (R-22); that the keys were in the truck, and the collision took place as he was hurrying to get back to Fat Boy's (R-23); that he was charged and convicted of unauthorized use of the truck (R-24); that when he got into it the truck was parked on the side entrance by the door (R-24); that the Fat Boy closed about 4:30 or 5 o'clock in the morning, and there were no customers around when the truck came to deliver fish that morning (R-24); that he saw the driver of the truck when he came in, and spoke to him, but he did not ask permission of the driver to take a spin in the truck, "Wallace asked him something like that" (R.25); and he admitted that he testified in the first trial that he had obtained permission to take a spin in the truck, but that was not so (R-26).

Respondents called *George Edward Glascoe* as a witness, and he testified that he was employed by the petitioner in 1941, and made a delivery to the Fat Boy Restaurant on New York Avenue on the morning of the 7th of May, 1941 (R-28-29); that he arrived there about 7:40 in the morning, drove the truck in off Bladensburg Road, parked, and went in to make the delivery; that he inquired as to who would sign the receipt, found that Wallace Jones was the one to sign, they went downstairs, checked the order and Jones signed for it, they talked a few minutes, and he then came upstairs and found that the truck was gone (R-30); that he had left the keys in the truck; that he might have been in the Fat Boy five or ten minutes, and that he had no instructions about leaving the keys in the truck, but used his common sense, and removed the keys when he was going somewhere where it was crowded, but at the time he just intended to drop the order and come back out (R-31); that when he arrived at the Fat Boy Restaurant that morning there were not any cars parked there or any people loitering around on the outside, and he only saw three boys in the restaurant (R-32); that he had made deliveries to the Fat Boy Restaurant during a two year period, and always drove around in back of the building

and parked near the back door, and on the occasion in question he parked within five feet of the back door (R-33); that his delivery that morning consisted of 7½ pounds of halibut fish (R-34); that he had left the keys in the truck on prior occasions in making deliveries at the Fat Boy, and had never had any experience of anyone meddling with or taking the truck, and he knew that it was the practice of other drivers making deliveries there to leave keys in the trucks, and he had never heard of anyone having his car stolen (R-34); that there was a driveway leading off New York Avenue with parking facilities in back of the restaurant (R-35).

The petitioner called *Harry L. Claxton,* who testified that he was president of petitioner which was engaged in the seafood business and had been since 1888 (R-37-38); that the company had used trucks since 1912 (R-38); that George Glascoe was employed in June or July of 1939 as a driver of one of their delivery trucks, making deliveries to hospitals, restaurants, and institutions, and he was instructed that he should not carry any passengers, should drive the car carefully, and should not loan it to anyone (R-38); that the Fat Boy Restaurant on New York Avenue was one of his customers to which deliveries were made, and had been for about three or four years prior to the occurrence in question, and he had never had any experience at the Fat Boy, or anywhere else that he made deliveries, of anyone meddling with or stealing a delivery truck while making a delivery, and he never heard of anyone else having such experience at the Fat Boy Restaurant (R-38-39); that he never gave his drivers any instructions about leaving the keys in the ignition switch, as he hired competent drivers and left that to their judgment and good common sense (R-40); and that he had been to the Fat Boy Restaurant, and knew it to be in operation in the afternoon and mostly at night (R-41).

Petitioner called *Raymond L. Mitchell,* salesman for Charles Schneider Baking Company, who testified that he

sold bread on a route, making deliveries by truck, that he served the Fat Boy Restaurant, and had been serving it for about eight years; that he identified petitioner's Exhibit No. 8 as an accurate picture of the location of the Fat Boy Restaurant, as it had existed without any change during the time he had made deliveries there; that he usually drove in from New York Avenue, went around to the back of the building, parked his truck, rapped on the door, and then went in and made deliveries; that he left his key in the truck; that there was no one around in the morning at all; and that he had never had any difficulty with anyone tampering with or stealing his truck (R-41-43). The petitioner also called *Joseph Savia,* of the Quick Service Laundry Company (R-46); *Donald G. Norris,* of the Royal Crown Cola Company (R-49); *Eugene McMickle,* of David G. Tavan, beer distributor (R-51); *Harry C. Mantzouranis,* of the Versis Food Specialty Company (R-52); *Joseph E. Henson,* of M. E. Horton, Inc. (R-54); *Robert C. Deal,* of the Carry Ice Cream Company (R-56); and *Harris L. Atwill,* of the Wilkins Coffee Company (R-58); all of whom testified as to their respective experiences in making deliveries of merchandise to the Fat Boy Restaurant for varying lengths of time, as to their customary practice of driving around to the rear of the building, parking the truck and leaving the key in the ignition switch while making deliveries, as to the fact that there was no one around the building in the mornings, and as to the fact that they never had experienced any difficulty with anyone tampering with or stealing their trucks.

At the conclusion of all the evidence, counsel for petitioner moved the court to direct a verdict in behalf of petitioner upon the ground that respondents had failed to establish any facts or circumstances upon which the jury could find that it was reasonably forseeable in the exercise of ordinary care, when petitioner's driver parked the truck, that the truck would be stolen if left unattended with the key in the ignition switch, and thereby that respondents had failed to prove any actionable negligence on the part

of petitioner or that any negligence of the petitioner was the proximate cause of respondents' injuries (R-60-66). The trial judge was of opinion that the prior decision of the Court of Appeals prevented him from passing upon the legal sufficiency of the evidence to go to the jury, and in fact required that he submit the issues to the jury for decision, and thereby overruled the motion (R-66-67).

Petitioner submitted its Prayer No. 4, wherein it requested the trial judge to instruct the jury that:

> "The jury is instructed that the fact defendant left its delivery truck temporarily unattended and with the ignition key in the switch is not negligence in the absence of circumstances and conditions making it reasonably forseeable by defendant in the exercise of ordinary care that said truck would be stolen if so left."

The trial judge denied the prayer (R. 67).

Petitioner submitted its Prayer No. 5, wherein it requested the trial Judge to instruct the jury that:

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in motion the factors which accomplish the injury. It may operate directly or by putting intervening agencies in motion.
>
> "Causal connection between original negligence and an injury is broken when there intervenes a wilful, malicious and criminal act of a third person which causes the injury, provided that such intervening wilful, malicious and criminal act was not intended by the person originally negligent and could not have been foreseen by him in the exercise of ordinary care."

The court denied the second paragraph of requested Prayer No. 5, but in so doing stated, "I think that is sound law, personally, but I feel I am constrained by that case." (*Ross* v. *Hartman*, supra.) (R. 67, 68.)

Petitioner submitted its Prayer No. 6, wherein it requested the trial judge to instruct the jury that:

> "You are instructed that if you should find from the evidence that the defendant was negligent in leaving the truck in question unattended with the ignition key therein, you shall then consider whether or not such negligence was the proximate cause of the injuries sustained by the plaintiffs; and if you should find from the evidence that the defendant could not have foreseen, in the exercise of ordinary care under the circumstances and conditions then existing, that the truck would be stolen or was likely to be stolen if so left unattended with the key therein, and if you should further find from the evidence that the truck was stolen or taken by a third person and thereafter operated in a negligent and careless manner by such third person, and that such negligence of such third person was the direct and efficient cause of the injuries sustained by the plaintiffs, then, in such case, the negligence of the defendant would not be the proximate cause of the injuries sustained by the plaintiffs, and your verdict should be for the defendant" (R. 76).

The trial judge denied the prayer as submitted (R. 68). Thereupon, the trial judge instructed the jury, giving only general definitions of negligence (R. 70-71), and proximate cause (R. 72), and failing to charge in any manner as to any standard whereby responsibility of petitioner would be measured or affected by the presence or absence of circumstances and conditions making the taking or theft of the truck reasonably foreseeable by petitioner's driver in the exercise of ordinary care. At the conclusion of the trial judge's charge to the jury, counsel for petitioner invited his attention to this omission, but he allowed the charge to stand (R. 74).

The jury returned a verdict in favor of respondents in the sum of $5400 and costs; and judgment was entered on the verdict (R. 66, 67).

Petitioner filed a motion to set aside the verdict and judgment, and to enter judgment for the petitioner in ac-

cordance with its motion for directed verdict, or, in the alternative, to set aside the verdict and judgment for respondents and order a new trial (R. 77-79). The trial judge denied the motion in a memorandum opinion, in which the Court referred to the prior expressions of the said Court of Appeals in *Ross* v. *Hartman*, and in the first appeal in this case, and indicated that they set forth the law in this jurisdiction which a trial judge must follow (R. 79-80).

Petitioner thereupon took an appeal to the United States Court of Appeals for the District of Columbia.

Refusal of U. S. Court of Appeals to Pass Upon Substantial Questions Presented on Second Appeal.

Petitioner, in presenting its appeal to the U. S. Court of Appeals for the District of Columbia, urged upon the court that respondents had failed to establish any actionable negligence on the part of the petitioner, in that, when petitioner's driver parked the truck on private property in the rear of the restaurant and left it unattended with the key in the switch for a few minutes required to make a delivery, there were no circumstances making theft of the truck reasonably foreseeable by the driver in the exercise of ordinary care, and that he was not required to anticipate and guard against the remote or slight possibility of the truck being stolen if so left, and also urged that respondents had failed to establish that any such negligence was the proximate cause of the injuries sustained by them, in that theft of the truck was not reasonably forseeable in the exercise of ordinary care as a probable result of leaving it unattended and unlocked, and that the unexpected theft was an intervening and efficient cause that superseded any negligence of petitioner's agent, as well as the fact that the negligent operation of the truck by the thief was the real proximate cause of the injuries sustained by respondents.

Under these propositions, petitioner urged upon the said Court of Appeals that the District Court had erred in

denying petitioner's motion for directed verdict and in denying petitioner's Prayer's Nos. 4, 5 and 6.

However, the Court of Appeals handed down its decision on the 28th day of May 1948, affirming the judgment of the District Court, (R-81). in which it held that on the first appeal it had said:

> "the evidence in the present case should be submitted to the jury with instructions to find for the plaintiffs if they found that the defendant's driver was negligent in leaving the car unlocked and that the negligence was a proximate cause of the accident. * * * The case will therefore be remanded for a new trial.";

that "*the law stated in that opinion,*" (italics supplied), had been followed by the District Court upon the new trial, and that therefore the judgment was affirmed.

Petitioner filed a petition for rehearing, but the said Court of Appeals denied the same on July 17, 1948.

II.

Statement of Jurisdiction.

The United States Court of Appeals for the District of Columbia entered a judgment on May 28, 1948 (R-83) affirming the judgment of the District Court; which decision is reported in 169 F. (2d) 303. A petition for rehearing was timely filed. The Court of Appeals denied the petition for rehearing on July 17, 1948 (R-95).

Jurisdiction of this Honorable Court to grant certiorari is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347).

III.

Questions Presented.

1. Whether the United States Court of Appeals for the District of Columbia, in reversing a judgment of dismissal for failure to establish a case under the issues tried in the District Court, and remanding the case for a new

trial on a totally different issue, in a proper exercise of its appellate jurisdiction, may:

(a) Consider certain evidence found in the record on appeal, and, by pre-judging its legal sufficiency, direct and require the District Court, upon the new trial on such totally different issue, to submit the case to a jury for determination.

(b) Deprive petitioner of the right to have the trial judge consider and initially determine the legal sufficiency of all of the evidence adduced, and otherwise to pass on all legal questions arising during the new trial on such totally different issue, thereby denying petitioner a fair trial in accordance with accepted and usual procedures.

(c) Foreclose consideration and determination of substantial legal questions arising initially in the course of the new trial upon such totally different issue, by application of the "law of the case" doctrine.

2. Whether petitioner, in leaving a vehicle on private property, unattended, with the key in the switch for a few minutes, may be guilty of actionable negligence in the absence of some fact or circumstances making it reasonably foreseeable in the exercise of ordinary care that the vehicle would be stolen if so left.

3. Whether petitioner's leaving the vehicle on private property, unattended, with the key in the switch, may be deemed the proximate cause of injuries resulting to respondents, in the absence of some fact or circumstances making theft of the vehicle reasonably foreseeable in the exercise of ordinary care if so left, when respondents' injuries resulted from negligent operation of the vehicle by a thief who took the automobile and operated it to the point of collision some substantial distance away from the place where it was stolen.

4. Whether the District Court erred in denying petitioner's motion for directed verdict.

5. Whether the District Court erred in denying petitioner's Prayers Nos. 4, 5 and 6.

6. Whether the District Court erred in submitting the case to the jury for decision without any standard or guide whereby the jury might reach an informed and properly reasoned verdict upon consideration of the evidence.

IV.

Reasons Relied on for the Allowance of the Writ.

1. Petitioner has been denied a fair trial in that its opportunity to have a fair and full hearing upon a totally different issue was improperly and unreasonably impaired and restricted by the action of the United States Court of Appeals for the District of Columbia in pre-judging the legal sufficiency of certain evidence found in the record on a prior appeal and in directing submission of the case thereon to the jury for determination.

2. Petitioner has been denied due process of law in that the District Court has entered judgment against it and the Court of Appeals has affirmed that judgment without either the trial judge in the first instance or the Court of Appeals on the appeal therefrom, giving any real consideration to, or deciding, substantial legal questions raised by petitioner during the course of the trial.

3. Petitioner has been denied free and untrammeled consideration of substantial legal questions, probably demonstrating that the judgment against it is unlawful, upon the basis that such consideration is foreclosed by the "law of the case" doctrine, and great injustice and injury will result to petitioner unless this Honorable Court grants this petition and reviews the case.

4. Petitioner has been adjudged liable to pay substantial sums to respondents in the absence of any violation of any duty on its part and by the process of submitting the case to the jury for determination without any standard or guide whereby the result would be saved from the mischance of speculation upon a legally unfounded claim.

5. Petitioner has been required to go through the formality of a trial without having a fair opportunity to obtain consideration and determination of substantial legal questions arising during the course of such trial, in accordance with accepted and usual procedures.

6. The decision of the United States Court of Appeals for the District of Columbia is in conflict with applicable and controlling decisions of this Honorable Court.

7. The United States Court of Appeals for the District of Columbia has decided an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the District of Columbia be reversed by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

R. W. CLAXTON, INCORPORATED,
Petitioner.

By JAMES M. EARNEST,
600 Woodward Bldg.,
Washington, D. C.

ALBERT F. BEASLEY,
300 Investment Bldg.,
Washington, D. C.

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Number ——.

R. W. CLAXTON, INCORPORATED, PETITIONER

vs.

BOYD F. SCHAFF, ET AL., RESPONDENTS

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Petitioner Has Been Denied a Fair Hearing By Unwarranted Action of the Court of Appeals.

The statement by the United States Court of Appeals for the District of Columbia that "Under that ruling [referring to the *Ross* case] the evidence in the present case should have been submitted to the jury," has been the cause of the predicament arising in this case. That sentence was unnecessary to the decision, and should be construed as dicta.

It was a mere expression of an opinion on a matter, the disposition of which was not required for the decision. *Barney et al.* v. *Winona & St. P. R. Co.*, 117 U. S. 228, 6 S. Ct. 654. As was very appropriately said by this Court

in *United States etc.*, v. *County Court of Clark County and the Justices thereof*, 96 U. S. 211, 24 L. Ed. 628, the "case called for nothing more; and if more was intended by the Judge who delivered the opinion, it was purely obiter."

It is the essential criterion of "appellate jurisdiction" that it revises and corrects the proceedings in a cause already instituted and does not create that cause. *Marbury* v. *Madison*, 5 U. S. 137, 2 L. Ed. 60; *Ex Parte Watkins*, 32 U. S. 568, 8 L. Ed. 786. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. *Sibbald* v. *U. S.*, 37 U. S. 488, 9 L. Ed. 1167.

"It is not the function of an appellate court to assume the powers of the trial court. * * *." *Schilling, et al.*, v. *Schwitzer-Cummins Co.*, 79 U. S. App. D. C. 20, 142 F (2d) 82.

A party litigant has a right to the determination of the facts in the first instance by the trial court. *Chicago M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 44 L. Ed. 417, 422, 20 S. Ct. 336; *City of Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, 24 S. Ct. 82. The evidence should be considered and passed on by the trial court before a reviewing court is called on to pass on it. *Wilson Cypress Co.* v. *Pozo*, 236 U. S. 635, 35 S. Ct. 446; *Oklahoma Natural Gas Co.* v. *Russell, et al*, 261 U. S. 290, 43 S. Ct. 353.

This rule has been heretofore followed by the United States Court of Appeals for the District of Columbia in *Washington and Georgetown Railroad Co.* v. *The American Car Co.*, 5 App. D. C. 524, where the Court said:

> "* * * We do not, of course, intend to be understood as in any manner qualifying the general principle that questions not made on the trial and presented to the court below for decision canont be entertained by this court. * * *"

An appellate court is not bound to anticipate—and should not anticipate—all of the questions that are likely to arise or might arise in the re-trial of a case when it reverses a

judgment and remands the case for re-trial. Hence the rule is "that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided." *Mutual Life Insurance Co. of N. Y.* v. *Hill*, 193 U. S. 551, 24 S. Ct. 538.

In the first appeal the "reversal operated to set aside the verdict and put the issues at large as they were before." *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 399, 33 S. Ct. 523. This is particularly true where, as here, respondents in the new trial completely abandoned their original theory of liability and the case was tried on a totally different issue.

The question as to whether or not the evidence adduced at the new trial on a totally different issue required submission of the case to the jury should have been determined by the trial judge "untrammelled by any supposed expression upon that point" by the United States Court of Appeals in its decision in the first appeal. *Prarie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.*, 299 U. S. 156, 57 S. Ct. 135, 81 L. Ed. 93.

As correctly stated by this Court in *Duke Power Co.* v. *Greenwood County, S. C.*, 299 U. S. 259, 57 S. Ct. 202, 81 L. Ed. 178,

> "If it appears that supervening facts require a re-trial in the light of changed situation, the appropriate action of the appellate court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that issues may be properly framed and the re-trial had."

In its decision on the first appeal, the United States Court of Appeals for the District of Columbia, in reversing the judgment of the District Court, did not revest the District Court with jurisdiction of the cause, to the end that totally different issues could be properly framed and a new trial had. On the contrary, the said Court of Appeals considered certain evidence found in the record on

appeal, prejudged its legal sufficiency, and directed and required the District Court, upon the new trial to be had on a totally different issue, to submit the case to a jury for its determination.

In so doing, it becomes manifest that the said Court of Appeals has exceeded its proper appellate jurisdiction, has usurped the essential prerogatives of the District Court to consider and initially determine the legal sufficiency of all of the evidence which might be adduced during the new trial, and otherwise to pass on all legal questions which might arise.

In the nature of things, petitioner had neither the occasion nor the opportunity to meet the evidence which was considered by the said Court of Appeals. Neither has petitioner had a fair opportunity to obtain consideration and determination of substantial legal questions arising for the first time during the new trial. Petitioner has, therefore, been denied due process of law, since it has been deprived of the accepted and usual procedures afforded litigants in civil actions.

II.

The "Law of the Case" Doctrine Cannot Properly Be Applied in the Retrial of an Action on a Totally Different Issue.

The application of the "law of the case" doctrine by the United States Court of Appeals for the District of Columbia, in summarily disposing of the second appeal, necessarily means that the statement of said Court of Appeals in its decision in the first appeal that "the evidence should have been submitted to the jury", was intended to mean and did in fact mean that the Court held, as a matter of law, that the fragmentary and unresisted evidence contained in the record in the first appeal was sufficient to make out a cause of actionable negligence and required submission of the case to the jury. The trial judge felt constrained to so construe the decision. It now appears

that the said Court of Appeals in its decision in the second appeal, has given the same binding interpretation and effect to the above quoted fortuitous statement.

The "law of the case" doctrine affects the retrial of an action after reversal only insofar as the issues of fact, the evidence, and the applicable law are substantially the same as upon the first trial. The doctrine of the "law of the case" is not an inexorable command. It "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power". *Messinger* v. *Anderson*, 225 U. S. 436, 444, 32 S. Ct. 739, 740. "It does not have the effect of placing the issue, the evidence, or even the applicable rules of law in a straight-jacket." *Miller's Mutual Fire Insurance Assoc.* v. *Bell*, 99 F. (2d) 289 (C. C. A. 8).

Where, as here, following the reversal of the District Court in the first appeal, amended pleadings were filed and substantially different evidence was developed in connection therewith, and the retrial was governed by entirely different principles of law, it cannot be said under any conceivable hypothesis that the doctrine of the "law of the case" could be properly invoked. Plainly, no "law of the case" could be established by mere dicta. The error is substantial, because petitioner has thereby been foreclosed from obtaining a decision upon substantial legal questions arising for the first time during the retrial of the case upon a totally different issue.

III.

Theft of the Truck Was Not Reasonably Foreseeable in the Exercise of Ordinary Care, and Neither Negligence Nor Proximate Cause Was Established by the Evidence.

Respondents were injured as a result of negligent operation of petitioner's truck by a thief. They allege that their injuries were proximately caused by the negligence of petitioner's driver in leaving the truck unattended with the

key in the ignition switch. The evidence disclosed that, when the driver parked the truck, there were no conditions or circumstances existing as would put a reasonably prudent person on notice that theft of the truck was a likely consequence of leaving it unattended with the key in the switch. Nothing of the kind had ever happened before.

In *Ross* v. *Hartman*, 78 U. S. App. D. C. 217, 139 F. (2d) 14, the Court of Appeals said:

> "Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. *The danger that they will do so on a particular occasion may be slight or great.* In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent *in some circumstances* although in other circumstances it might be both negligent and a legal or 'proximate' cause of a resulting accident." (Emphasis supplied.)

As authority for the aforesaid statement that "in some circumstances" both negligence and proximate cause may exist, the Court of Appeals cited certain decisions by New York courts, mainly: *Lee* v. *Van Buren and New York Bill Posting Co.*, 190 App. Div. 742, 180 N. Y. S. 295; *Gumbrell* v. *Clausen Flanagan Brewery*, 199 App. Div. 778, 192 N. Y. S. 451; *Connell* v. *Berland*, 233 App. Div. 234, 228 N. Y. S. 20; *Maloney* v. *Kaplan*, 233 N. Y. 426, 135 N. E. 838.

In the *Lee*, *Gumbrell* and *Connell* cases, the vehicle was left unattended with the key in the switch, and was of such construction that it could be started up by merely moving a lever. Children at play got on the vehicle and moved the lever, and the vehicle thereupon was set in motion and caused to strike the party injured. In each case there was prior notice of children playing on the vehicle. In the *Maloney* case, the vehicle was parked on a grade, and started up and rolled down the grade, either because it had not been securely parked or because some meddlesome boys released the brake.

The New York courts have established beyond question, and with compelling logic, that the owner of a vehicle is not negligent in leaving a vehicle unattended with the key in the switch, unless the circumstances then existing make it reasonably foreseeable in the exercise of ordinary care that the vehicle will be meddled with if so left. *Tierney, etc.* v. *New York Dugan Bros.*, 288 N. Y. 16, 41 N. E. (2d) 161, 140 A. L. R. 534; *Kaplan* v. *Shults Bread Co.*, 212 App. Div. 110, 208 N. Y. S. 118; *Mann* v. *Parshall*, 229 App. Div. 366, 241 N. Y. S. 673; *Touris* v. *Brewster and Co.*, 235 N. Y. 226, 139 N. E. 249; *Walter* v. *Bond*, 267 App. Div. 779, 45 N. Y. S. (2d) 378; *Pesaty* v. *Hearn and Son*, 202 N. Y. S. 264; *Vincent* v. *Crandall and Godley Co.*, 131 App. Div. 200, 115 N. Y. S. 600; *Berman* v. *Shultz*, 40 Misc. Rep. 212, 81 N. Y. S. 647.

The same rule has been established as the law by decisions of courts in other jurisdictions. *Jackson* v. *Mills-Fox Baking Company*, 221 Mich. 64, 190 N. W. 740, 26 A. L. R. 906; *Rhad* v. *Duquesne Light Co.*, 255 Pa. 409, 100 Atl. 262.

Even if deemed negligence, the act of leaving the vehicle unattended with the key in the switch must be the proximate cause of respondents' injuries before any liability can be imposed. Proximate cause exists only when "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *Milwaukee and St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256. "Events too remote to require reasonable provision need not be anticipated." *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 239.

In every case that counsel have been able to find wherein the vehicle was stolen and injury caused to another by negligent operation on the part of the thief, the courts have held that any act of negligence of the owner in leaving the vehicle unattended with the key in the switch was not the proximate cause of such injury. *Slater* v. *T. C. Baker Co.*, 261 Mass. 424, 158 N. E. 778; *Sullivan* v. *Griffin*, — Mass.

—, 61 N. E. (2d) 330; *Lotito* v. *Kyriacus, et al,* 74 N. Y. S. (2d) 599, 600, 601.

IV.

This Court Is Not Bound by Any "Law of the Case" and Should Review the Judgment to Prevent a Manifest Injustice.

After a Circuit Court of Appeals has affirmed a judgment on the ground that their decision in an earlier appeal has become the "law of the case", this Court is nevertheless free to take the case on certiorari and reverse the judgment. *Panama Railroad Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 284, 17 S. Ct. 572. This Court frequently does so. *Western Union Telegraph Co.* v. *Czizek,* 264 U. S. 281, 44 S. Ct. 328; *American Surety Co.* v. *Greek-Catholic Union,* 284 U. S. 563, 52 S. Ct. 235; *Illinois Central RR Co.* v. *Crail,* 281 U. S. 57, 50 S. Ct. 180.

The judgment of the said Court of Appeals on the second appeal must stand or fall on its merits and has no improved standing before this Court from the fact that it resulted from an application of that Court's "law of the case". cf *White* v. *Higgins,* 116 F. (2d) 312, (CCA 1). When this Court, in the exercise of its supervisory jurisdiction issues a writ of certiorari to bring up the whole record, the entire case is before this Court for examination. *Panama Railroad Co.* v. *Napier Shipping Co.,* supra; *Messinger* v. *Anderson,* 225 U. S. 436, 444, 32 S. Ct. 739, 740.

The judgment of said Court of Appeals in the first appeal, merely reversed the judgment of the District Court, and ordered a new trial. Essentially, it was interlocutory in nature. Now that the case has proceeded to a final judgment in said Court of Appeals, petitioner is entitled to its correction. *U. S.* v. *Beatty,* 232 U. S. 463, 34 S. Ct. 392; *U. S.* v. *Denver & R. G. R. Co.,* 191 U. S. 84, 93, 24 S. Ct. 33.

The earlier adjudication was plainly wrong, and the erroneous application of the doctrine of the "law of the case"

works a manifest injustice to petitioner, since it has never had an opportunity to have any judge or any court give due and proper consideration to its contentions. This Court should therefore reverse the judgment.

Respectfully submitted,

JAMES M. EARNEST
600 Woodward Building
Washington 5, D. C.

ALBERT F. BEASLEY
300 Investment Building
Washington, D. C.

Attorneys for Petitioner